A

SEAN O'CASEY PATTERSON

v.

CHAN HOONG POH & ORS AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
WAN ADNAN MUHAMAD JCA
AZHAR MA'AH JCA
[CIVIL APPEALS NO: W-01-65-2008 & W-01-66-2008]

C

30 MARCH 2010

FAMILY LAW: *Children - Adoption - Muslims - Whether Registration of Adoption Act 1952 applicable to Muslims - Adoption Act 1952 to be read and interpreted independently of Registration of Adoptions Act 1952*

D

- Nothing to bar application of Registration of Adoption Act 1952 to Muslims

FAMILY LAW: *Children - Adoption - Adoption under Registration of Adoption Act 1952 - Whether requirements for adoption satisfied - Whether consent of natural parents obtained - Wrong person named as father in birth certificate of child - Registrar can rely on information regarding parents contained in birth certificate of child - Whether child was maintained and educated by adopters before adoption - Whether proper to dislodge child from adopters - Whether requirements of s. 6 of Registration of Adoption Act 1952 satisfied*

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F

FAMILY LAW: *Marriage - Validity of - Bride already legally married to another person - Whether marriage void - Law Reform (Marriage and Divorce) Act 1976, ss. 5, 6*

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The plaintiff/appellant (an American citizen) claimed that he and the 1st respondent were married in Las Vegas. The 1st respondent denied the marriage but agreed to having lived with the appellant as a result of which she had given birth to a baby boy named Jordan Ter Wei ("Jordan"). The appellant lived in the United States

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and the 1st respondent lived in Malaysia when Jordan was born. The appellant later discovered that Jordan's original birth certificate contained someone else's name as the father. A DNA profiling test confirmed that the appellant was the biological father of Jordan. Following this, the appellant went to the Jabatan Pendaftaran

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Negara to rectify Jordan's birth certificate. There, he discovered that the 2nd and 3rd respondents (1st respondent's sister and her

husband) had on 18 February 2004 adopted Jordan under the Registration of Adoption Act 1952 ("Act 253"). The 2nd and 3rd respondents being Muslims had also converted Jordan who now went by the name of Eusof Jordan Nik Ahmad. Aggrieved, the appellant therefore filed an originating summons in the High Court praying, *inter alia*, for the following orders: (i) a declaration that the appellant was the biological father of Jordan; (ii) that the fourth and/or fifth respondent (respectively the Registrar-General of Births & Deaths and the Registrar of Adoptions) amend/rectify the register so that the appellant be named as the father of Jordan; (iii) that the fourth respondent amend and/or rectify the register so that Jordan's name be changed back to Jordan O'Casey Patterson; (iv) a declaration that Jordan's adoption by the 2nd and 3rd respondents and the registration of the adoption was null and void and be set aside; (v) that the appellant be granted sole and exclusive guardianship, custody, care and control of Jordan; (vi) that the conversion of Jordan to Islam was null and void; and (vii) that Jordan be delivered to the appellant immediately. Learned counsel for the appellant contended that the adoption of Jordan by the 2nd and 3rd respondents pursuant to Act 253 ought to be set aside, *inter alia*, on the grounds that the Act is not applicable to Muslims and the lack of consent by biological parents. The learned Judicial Commissioner only allowed the first two prayers and hence this appeal by the appellant.

Held (dismissing the appeal with an additional order that the granting of the second prayer by the Judicial Commissioner be set aside)

Per Azhar Ma'ah JCA delivering the judgment of the court:

(1) The trial judge was correct in allowing the appellant's first prayer. However, the learned judge erred in respect of the 2nd prayer which she had granted in favour of the appellant. At the time when the appellant and the 1st respondent went through the purported marriage ceremony in Las Vegas, the 1st respondent was still in marriage with one John Kung. This being the case, the purported marriage ran counter to the provision of s. 5 of the Law Reform (Marriage & Divorce) Act 1976. Under s. 6 of the Act every marriage contracted in contravention of s. 5 shall be void. (paras 8 & 9)

(2) Whilst the effect of an adoption as stipulated under s. 9 of Adoption Act 1952 ("Act 257") is repugnant to Islamic Law, such provision is not found in Act 253. Act 253 merely lends legal recognition to the *de facto* status of the adoptive parent having custody and being responsible for the care, maintenance, and welfare of the adopted child. The fact that both Acts were passed at about the same time in 1952 with only Act 257 providing for the exclusion of Muslims reflects the true intention of the legislature not to bar the application of Act 253 to Muslims. *Abdul Shaik Md. Ibrahim & Anor v. Hussein Ibrahim & Anor* (ovrd). (paras 15

(3) In the original birth certificate of Jordan, one Bart Van Hoek had been named as the father. The Surat Keizinan Pengangkatan stated that Bart Van Hoek could not be contacted. Based on this information, the 4th and 5th respondents processed and approved the application for registration of the adoption. The Registrar in approving the registration of the adoption in question had exercised his discretion appropriately. In the absence of any evidence to the contrary, the Registrar is expected to accept and receive evidence of any witnesses supporting such application as statement of truth and thus become duty bound to register an adoption by entering the particulars thereof in the register. (paras 18, 19 & 20)

(4) Therefore, all the prayers except for prayer (i) asked for by the appellant before the High Court below were unsustainable, as granting of those orders would not have been in the best interest of the child. (para 21)

(5) Jordan had been in the custody and care of the 2nd and 3rd respondents since the year 2000, not long after he was born. The 1st respondent was seeing less and less of him. The 2nd and 3rd respondents were in good position to provide well for the child. At the same time, the 2nd and 3rd respondents being Muslims themselves must have brought up the child in Islamic way. Thus, since the child who was now about ten years old was comfortably lodged in the custody and care of the 2nd and 3rd respondents, it was not in his best interest and welfare to dislodge him and place him in the care and custody of the appellant who was virtually a stranger to him. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/perayu (seorang warga Amerika) mendakwa bahawa beliau dan responden pertama telah berkahwin di Las Vegas. Responden pertama menafikan dakwaan tersebut tetapi bersetuju telah bersekedudukan dengan perayu sehingga melahirkan seorang anak lelaki bernama Jordan Ter Wei ("Jordan"). Semasa Jordan dilahirkan, perayu menetap di Amerika Syarikat sementara responden pertama tinggal di Malaysia. Perayu kemudian mendapat tahu bahawa surat beranak asal Jordan telah mencatatkan nama seorang orang lain sebagai bapanya. Ujian profiling DNA mengesahkan bahawa perayu adalah bapa kandung Jordan, dan berikutnya perayu telah pergi ke Jabatan Pendaftaran Negara untuk membetulkan surat beranak Jordan. Di situ, perayu mendapati bahawa Jordan telah diambil sebagai anak angkat oleh responden-responden kedua dan ketiga (kakak responden pertama dan suaminya) di bawah Akta Pendaftaran Pengangkatan 1952 ('Akta 253') pada 18 Febuari 2004. Dan sebagai orang Islam, responden-responden kedua dan ketiga juga telah mengIslamkan Jordan yang kini bernama Eusof Jordan Nik Ahmad. Terkilan, perayu memfailkan saman pemula di Mahkamah Tinggi memohon antara lain untuk perintah-perintah berikut: (i) suatu deklarasi bahawa perayu adalah bapa kandung Jordan; (ii) bahawa responden-responden keempat dan kelima (masing-masing Pendaftar Besar Kelahiran & Kematian dan Pendaftar Pengangkatan) meminda/membetulkan buku daftar dengan menamakan perayu sebagai bapa; (iii) bahawa responden keempat meminda dan/atau membetulkan buku daftar dengan menukar nama Jordan kembali ke Jordan O'Casey Patterson; (iv) suatu deklarasi bahawa pengangkatan Jordan oleh responden-responden kedua dan ketiga serta pendaftarannya adalah tak sah dan batal dan diketepikan; (v) bahawa perayu diberi hak penjagaan dan kawalan tunggal dan eksklusif ke atas Jordan; (vi) bahawa pengIslaman Jordan adalah tak sah dan batal; dan (vii) bahawa Jordan hendaklah dengan serta merta diserahkan kepada perayu. Yang arif peguam perayu berhujah bahawa pengangkatan Jordan oleh responden-responden kedua dan ketiga di bawah Akta 253 harus diketepikan atas alasan antara lain bahawa Akta tidak terpakai kepada orang Islam dan tiadanya persetujuan oleh bapa kandung. Yang arif Pesuruhjaya Kehakiman hanya membenarkan dua permohonan yang pertama di atas, sekaligus menyebabkan perayu merayu

A **Diputuskan (menolak rayuan dengan perintah tambahan bahawa pembenaran permohonan kedua oleh Pesuruhjaya Kehakiman diketepikan)**
Oleh Azhar Ma'ah HMR menyampaikan penghakiman mahkamah:

B **(1)** Hakim bicara betul dalam membenarkan permohonan pertama perayu. Bagaimanapun, yang arif hakim khilaf berkaitan permohonan kedua yang dibenarkannya kepada perayu. Pada masa perayu dan responden pertama menjalani akad perkahwinan yang didakwa tersebut di Las Vegas, responden pertama masih
C lagi terikat dengan perkahwinannya dengan John Kung. Dalam keadaan sedemikian, perkahwinan yang didakwa tersebut telah melanggari peruntukan s. 5 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976. Di bawah s. 6 Akta ini, setiap perkahwinan yang melanggari s. 5 di situ adalah batal.

D **(2)** Sementara kesan sesuatu pengangkatan seperti yang diperuntuk di bawah s. 9 Akta Pengangkatan 1952 ('Akta 257') adalah tidak bersesuaian dengan Undang-Undang Islam, peruntukan sedemikian tidak terdapat di dalam Akta 253. Akta 253 hanya memberi pengiktirafan undang-undang kepada status *de facto* ibu
E bapa angkat sebagai mempunyai hak penjagaan dan bertanggungjawab terhadap penjagaan, penafkahan dan kebajikan anak angkat. Fakta bahawa kedua-dua Akta telah diluluskan pada waktu yang hampir sama pada tahun 1952 tetapi hanya
F Akta 257 memperuntukkan tentang keterkeluaran orang Islam, mencerminkan niat sebenar badan perundangan untuk tidak menghalang pemakaian Akta 253 kepada orang Islam. *Abdul Shaik Md. Ibrahim & Anor v. Hussein Ibrahim & Anor* [1999] 3 CLJ 539 (ditolak).

G **(3)** Di dalam surat beranak asal Jordan, seorang Bart Van Hoek telah dinamakan sebagai bapanya. Surat Keizinan Pengangkatan pula menyatakan bahawa Bart Van Hoek telah tidak dapat dihubungi. Berdasarkan maklumat ini, responden-responden keempat dan kelima telah memproses dan meluluskan
H permohonan untuk mendaftar pengangkatan. Pendaftar, dalam meluluskan pendaftaran pengangkatan telah melaksanakan budibicaranya dengan secara wajar. Dalam ketiadaan sebarang keterangan sebaliknya, Pendaftar harus menerima dan mengambil keterangan mana-mana saksi yang menyokong
I permohonan sedemikian sebagai kenyataan yang benar, dan

akibatnya bertanggungjawab untuk mendaftar pengangkatan dengan memasukkan butiran-butiran berkaitan di dalam buku daftar.

(4) Dengan hal yang demikian, kesemua permohonan kecuali permohonan (i) yang dipohon oleh perayu di Mahkamah Tinggi di bawah tidak boleh dibenarkan, memandangkan pembenarannya adalah tidak bertepatan dengan kebajikan terbaik untuk si anak.

(5) Jordan telah berada dalam jagaan dan tanggungan responden-responden kedua dan ketiga sejak tahun 2000, iaitu tidak lama selepas beliau dilahirkan. Responden pertama telah semakin jarang menemuinya. Responden-responden kedua dan ketiga juga mempunyai kemampuan untuk memberi yang terbaik kepada Jordan. Pada masa yang sama, responden-responden kedua dan ketiga, sebagai orang Islam, semestinya telah membesarkan Jordan menurut cara Islam. Oleh itu, memandangkan bahawa si anak yang kini berumur 10 tahun selesa berada di bawah jagaan dan tanggungan responden-responden kedua dan ketiga, maka adalah tidak selaras dengan kebajikan dan kepentingannya untuk mengambilnya keluar dan menyerahkannya kepada perayu yang merupakan seorang orang asing kepadanya.

Case(s) referred to:

Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors [1999] 3 CLJ 539 HC ***(ovrd)***

Arumugam Seenivasagam v. Sinnamah [1959] 1 LNS 7 ***(refd)***

In Re McGrath [1893] 1 Ch 143 ***(refd)***

Legislation referred to:

Adoption Act 1952, ss. 9, 31

Law Reform (Marriage & Divorce) Act 1976, ss. 5, 6

Registration of Adoption Act 1952, ss. 6(1)(b), 8, 10(4), 31

For the appellant - YN Foo (Miss Sharmini with him); M/s YN Foo & Partners

For the 1st respondent - Sharmini Jayas; M/s Joyan & Assoc

For the 2nd & 3rd respondents - S Ravichandran (CY Ng with him); M/s Seah Balan Ravi & Co

For the 4th & 5th respondents - Amir Nasruddin (Zarifah Zulghaffar with him); Legal Advisor

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S8-24-2813-2005]

Reported by Amutha Suppayah

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JUDGMENT

Azhar Ma'ah JCA:

[1] At the High Court below the applicant/appellant Sean O'Casey Patterson applied for the following orders:

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(a) a declaration that the plaintiff Sean O'Casey Patterson is the biological father of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad;

C (b) that the fourth and/or fifth defendant amend/rectify the register so that the plaintiff, Sean O'Casey Patterson be named as the father of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad in the Birth Certificate No. 000321-14-0363/ AQ 53834;

D (c) That the fourth defendant amend and/or rectify the register so the child previously named Jorden Ter Wei and now named Eusof Jordan Nik Ahmad be named Jordan O'Casey Patterson instead;

E (d) a declaration that the adoption of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad by the 2nd and 3rd defendant is null and void and invalid and such adoption be set aside;

F (e) a declaration that the registration of adoption of child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad by the 2nd and 3rd defendant is null and void and invalid and such registration of adoption be set aside;

G (f) that the fourth and/or fifth defendant annul and/or cancel the registration of adoption of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad.

(g) that the plaintiff abovenamed, Sean O'Casey Patterson be granted sole and exclusive guardianship, custody, care and
H control of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad;

(h) a declaration that the conversion of the child previously named Jordan Ter Wie and now named Eusof Jordan Nik Ahmad into
I the Islam religion is null and void;

(i) that the second and third defendants any/or such other person or persons having custody and/or possession and/or control of the child previously named Jordan Ter Wie and now named Eusof Jordan Nik Ahmad do deliver the said child to the plaintiff immediately;

(j) that the plaintiff be at liberty all times to reside out of the jurisdiction of Malaysia with Jordan O'Casey Patterson (the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad);

(k) no order as to costs; and

(l) any further or other relief deemed fit by this Honourable Court.

[2] The learned Judicial Commissioner after hearing the parties allowed prayers (a) and (b) only and dismissed the rest of the prayers. Hence, this appeal.

[3] The material fact for the purpose of this appeal may be stated as follows.

[4] The appellant, an American citizen, first met the 1st respondent in 1998 and they started dating in March 1999. In April the same year they got married at the Little Church of the West Wedding Chapel, Las Vegas. The 1st respondent does not deny the event took place but contends that the ceremony was merely "an exchange of love in an informal setting". Thus she denies the existence of any marriage between her and the appellant for the reason aforesaid.

[5] As a result of the relationship between them, the 1st respondent on 21 March 2000 gave birth to a baby boy whom she named Jordan Ter Wei (Jordan), at the Pantai Hospital, Kuala Lumpur. The appellant came to Malaysia in April 2000 to see the baby and for his christening ceremony. Thereafter, for the period between 2001 to 2004, according to the appellant he made numerous trips to Malaysia to visit the 1st respondent and Jordan. According to the appellant their initial plan was for the 1st respondent to come with Jordan to the United States to join the appellant and set a home there. The said plan did not materialise as the 1st respondent was reluctant to return to the United States. Despite not keeping to this plan, the appellant, according to him, had always made sure that money was sent to the 1st respondent

A to be used for herself and Jordan. Then, upon realising that there was no prospect of the 1st respondent and Jordan ever coming to settle down in the United States, the appellant was compelled to retain the services of counsel to protect his and his child's rights and put in place a more structured maintenance arrangement for
B the child. At the same time the appellant was also concerned about the status of Jordan's birth certificate, a copy of which was given to him presumably by the 1st respondent which he suspected to have been falsified. The suspicion arose as a result of the appellant's coincidental meeting with one Bart Van Hoek with whom it was
C discovered that the 1st respondent had a previous relationship. It was found out that the said gentleman was in possession of Jordan's original birth certificate. It was also discovered by the appellant that the said Bart Van Hoek was named as the biological father of Jordan in the original birth certificate. Following that, the appellant
D decided to do DNA profiling test. Two tests were done and both results show that the appellant was the biological father of Jordan. Following this, the appellant, sometime in 2005 decided to go to Jabatan Pendaftaran Negara to rectify the child's birth certificate so that he would be named as Jordan's father. There he discovered that
E the 2nd respondent, Firdaus Chan binti Abdullah, who is the sister of the 1st respondent, and her husband, the 3rd respondent, had on 18 February 2004 adopted the said child under the Registration of Adoption Act 1952. The 2nd and 3rd respondents being Muslims had also converted Jordan who now goes by the name of Eusof
F Jordan Nik Ahmad. Following the abovementioned discovery, the appellant subsequently filed an originating summons in the Kuala Lumpur High Court praying for orders as aforesaid.

[6] For clarity and better understanding of this appeal it would be
G convenient at this juncture to further state that there was a concurrent proceeding before the same judge of the High Court commenced by the 1st respondent *vide* summons-in-chambers wherein the 1st respondent sought *inter alia* the following orders:

H i) a declaration that the adoption of the child previously known as Jordan Ter Wei and now known as Eusof Jordan Nik Ahmad by the 2nd and 3rd defendants is null and void and invalid and is hereby set aside;

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ii) a declaration that the registration of adoption of the child ... is null and void and invalid and is hereby set aside;

iii) the 4th and 5th defendants hereby annul and rescind the registration of the child ...

iv) the 4th and 5th defendants hereby make the necessary amendments/rectification to the register so the child previously known as Jordan Ter Wei and now known as Eusof Jordan Nik Ahmad be named Jordan O'Casey Patterson;

v) the 1st defendant is granted custody, care and control of the child ...

vi) the child ... delivered and returned to the 1st defendant immediately;

vii) a declaration that the conversion of the child into the Islam religion is null and void.

[7] By consent of the parties, both the appellant's and the 1st respondent's applications were heard together for obvious reason ie, that they emanate from the same set of facts. Although the outcome of the 1st respondent's application is of no significance to the present appeal, for completeness it is stated here that the said application was dismissed by the learned trial judge.

The Appeal

[8] With regard to the first prayer in the appellant's application, based on the result of the DNA test done on the appellant (exh. P32) and also the admission by the 1st respondent the biological mother of Jordan, that the appellant is the child's biological father, the learned trial judge had no difficulty in arriving at a finding of facts that the appellant is the biological father of Jordan. Hence, the order as per the appellant's first prayer. On our part we find no reason to disagree with the trial judge. However, we are not with the trial judge in respect of the 2nd prayer which she had granted in favour of the appellant. This issue has to be dealt together with the other prayers in the appellant's application. It is submitted for the appellant that as the biological father to Jordan the appellant's rights over the child should supercede all other 3rd party claim, and thus the appellant has absolute rights to custody of his child, unless he has forfeited it by certain sorts of misconduct. In support of this proposition, a decision in *Arumugam s/o Seenivasagam v.*

A *Sinnamah (f)* [1959] 1 LNS 7 was referred to. Apparently what was stated in that case was the position at common law. We find no reason to disagree with that. However, it is to be remembered that over the years certain statutes have been passed which did limit to some extent the rights of the parent, though not guilty of
B misconduct that would disentitled him or her to the custody of the child at common law.

[9] A pertinent point that emerged from the background of this case is an uncontroverted fact that at the time when the appellant
C and the 1st respondent went through the purported marriage ceremony in Las Vegas, the 1st respondent was still in marriage with one John Kung. This being the case, it is plainly obvious that the purported marriage ran counter the provision of s. 5 of the Law Reform (Marriage & Divorce) Act 1976 which reads:

D **Disability to contract marriage otherwise than under this Act**

5(1) Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such
E marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the first mentioned marriage or the purported second marriage is contracted within Malaysia or outside Malaysia.

[10] It follows that under s. 6 of the Act "every marriage
F contracted in contravention of s. 5 shall be void". This is the position that the appellant is in with regard to his purported marriage to the 1st respondent. Having arrived at this finding, the next issue concerns the adoption of Jordan by the second and third respondents. This issue is common to both the appellant and the
G 1st respondent as they had sought a declaration that the said adoption is null and void and that the adoption and/or registration of the adoption be set aside. Learned counsel for the appellant contends that the adoption of Jordan by the second and third respondents pursuant to the Registration of Adoption Act 1952
H ought to be declared null and void and set aside on the following grounds.

i) the Act is not applicable to Muslims;

ii) lack of consent by biological parents;
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iii) conditions under s. 6 of the Act have not been fulfilled;

iv) conditions under s. 6 of the Act have not been fulfilled/satisfied; and

v) registration under the Registration of Adoption Act does not confer on the child full status of a child born to the adopters in lawful wedlock.

[11] To substantiate the first ground the court's attention is drawn to a High Court decision in *Abdul Shaik Md. Ibrahim & Anor v. Hussein Ibrahim & Ors* [1999] 3 CLJ 539. The learned judge in that case took the approach that the Registration of Adoption Act 1952 should be read together with the Adoption Act 1952 which by virtue of s. 31 is not applicable to Muslims. Hence, the trial judge decided that the registration is void.

[12] Relying on the above decision, learned counsel for the appellant contended that the second and third respondents being Muslims, the purported registration of adoption of Jordan by the fourth and fifth respondents is, therefore null and void.

[13] In the instant case, we had the advantage of scrutinising the grounds of judgment of the learned Judicial Commissioner and it is noted that she had carried out somewhat minute examination of both the Registration of Adoption Act and the Adoption Act. Following that exercise, she made her finding *inter alia* as follows:

> In determining this issue, an examination of the contents of Act 253 and that of the Adoption Act 1952 (Act 257) therefore becomes necessary. The preambles of both Acts do not offer much assistance in that Act 253 merely says that it is "An Act to provide for the registration of adoptions" whilst that of Act 257 states that it is "an Act to provide for the adoption of children". By merely looking at the titles of the Acts, it would not be difficult to come to a misleading conclusion that one can apply for an adoption order under Act 257 and then register the adoption order under Act 253, However, a reading of the relevant sections in the Acts will clearly show that it is not so. To start with, section 6 of Act 253 provides as follows:
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> **6. Registration of *de facto* adoptions**
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> (1) Where at the date when application for registration is made any child under the age of eighteen years who has never been married is in the custody of, and is being brought up, maintained and educated by any person, or by two spouses jointly, as his, her or their own child under any *de*

A *facto* adoption, and has for a period of not less than two years continuously and immediately before the date of such application been in such custody and has been so brought up, maintained and educated, the Registrar may, upon the application, in the form in the First Schedule, of such person or spouses, register the adoption if:

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(a) such person or spouses and the child shall appear before the Registrar and shall produce to the Registrar such evidence either oral or documentary as may satisfy the Registrar that such adoption took place;

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(b) the parents or one of the parents, or, if both the parents are dead or if neither of the parents is within West Malaysia, any guardian of the child shall appeal before the Registrar and express consent to the adoption;

D Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signified his consent by statutory declaration; and

E (c) the prescribed fees are paid.

(2) The Registrar shall register an adoption by entering the particulars thereof in the register.

It is therefore apparent that under Act 253, the power to register F an adoption is vested with the Registrar of Adoption. In contrast, the power to make adoption orders under Act 257 is the Court having jurisdiction to do so under the said Act. The equivalent section to that of section 6 in Act 253 would be section 8. It reads as follows:

G **8. Provision as to existing *de facto* adoptions.**

Where at the date of the commencement of this Act any child is in the custody of, and is being brought up, maintained and educated by any person or by two spouses jointly as his, her or their own child under any *de facto* H adoption, and has for a period of not less than two years before such commencement been in such custody, and has been so brought up, maintained and educated, the Court may, upon the application of such person or spouses and notwithstanding that the applicant is a male and the child a I female, make an adoption order authorising him, her or them to adopt the child without requiring the consent of any parent

or guardian of the child to be obtained, upon being satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child that no such consent should be required and that an adoption order should be made.

It is very clear, therefore, that a comparison between section 6 of Act 253 and section 8 of Act 257 seems to show that one could effect an adoption either by way of 'registration' under Act 253 or by way of a Court Order under Act 257. The reason for choosing one over the other is not clear, although one could argue that there is more strength in an order of court. This is more so because Act 257 very clearly and specifically spelt out that "Upon an adoption order being made, all rights, duties, guardian or guardians of the adopted child; in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall rest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock ...". The same provision is not found in Act 253.

Also, under Act 253, the Registrar is requested to keep a register which is prescribed in the Second Schedule in the same Act. Act 257 by way of section 25 provides for what is known as the "Adopted Children Register".

In view of these differences in the two Acts, in my opinion, there is a basis to support the proposition that Act 253 and Act 257 should be read and interpreted quite independently of one another. My view is further fortified by the provision of section 10 of Act 253 which states that "The Register shall not register any adoption in respect of any child who has been the subject of an adoption order made in accordance with the Adoption Act 1952 (Act 257)". It seems to me, therefore, that this provision clearly separates the operation of Act 253 from that of Act 257.

Having said that, I am also of the view that a different approach be taken on the question of the applicability of Act 253 to Muslims. Whilst Act 257 is very clear in its non-applicability to Muslims by virtue of section 3 of the Act, the same is not found in Act 253. Act 253 is silent on this. In my view, therefore, in the absence of an equivalent provision to that of section 3 in Act 257, and the fact that the operation of the two Acts is quite independent of one another, there is nothing to bar the application of Act 253 to persons professing the religion of Islam. It was, in fact, brought to

A my attention by the learned Federal Counsel for the Fourth and the Fifth Defendants of a passage in *Halsbury's Laws of Malaysia* (Vol. 8) MLJ 58, wherein it was quoted:

> It should be noted that the Registration of Adoption Act 1952 was intended for the use of Muslims. This is because
B Islam does not recognise adoption and in order to legitimate such customary practice, the adoption could be registered under this Act so as to safeguard the right to custody of the adopted parents.

C This statement is not without merits. Without proper documentation, how else then can a Muslim couple who has taken upon themselves the care of a child go about doing simple, routine things such as enrolling the said child into a school, or for the purpose of obtaining identity cards or even applying for passports?

D I, therefore, hold that the contention of learned Counsel for the Plaintiff on this ground is without merits.

[14] We agree with the learned JC for the reasons given by her that Act 253 also applies to Muslims. We would go a step further to hold that *Abdul Shaik Md. Ibrahim & Anor. v. Hussein Ibrahim & Ors. (supra)* was wrongly decided. The learned judge in that case said that Act 253 is silent as to whether it applies to Muslims and after quoting s. 31 of Act 257 which excludes its application to Muslims states:

F The reason why Muslims are excluded from the operation of the Adoption Act 1952 (Act 257) is obvious. The effect of adoption under the Act is repugnant to Islamic Law. I need not elaborate on this.

G I am of the view that the two Acts should be read together otherwise the purpose for excluding Muslims from the operation of the Adoption Act 1952 is defeated.

[15] Whilst the effect of an adoption as stipulated under s. 9 of Act 257 is repugnant to Islamic Law, such or similar provision is
H not found in Act 253. Act 253 merely lends legal recognition to the *de facto* status of the adoptive parent having custody and being responsible for the care, maintenance, and welfare of the adopted child. The fact that both Acts were passed at about the same time in 1952 with only Act 257 providing for the exclusion of Muslims

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reflects the true intention of the legislature not to bar the application of Act 253 to Muslims. The two legislation must be read independently as s. 10(4) of Act 253 specifically bars the registration thereunder of any adoption under Act 257. The view expressed in *Halsbury's Laws of Malaysia*, vol. 8 that Act 253 was intended for the use of Muslims is not without basis. The decision of the High Court on the point of law in *Abdul Shaik Md. Ibrahim & Anor. v. Hussein Ibrahim & Anor. (supra)* is therefore overruled.

[16] We now move on to another issue raised by the applicant in grounding his appeal. It concerns the requirement for consent under s. 6 of the Registration of Adoption Act. Learned counsel for the appellant argued that the facts and the evidence shows that the 1st respondent did not give up Jordan for adoption and she had denied signing a statutory declaration for consent to adoption.

[17] In this regard, it is noted that the Judicial Commissioner had made a finding of facts out of the testimony of the 1st respondent in the following terms:

> Having perused through the evidence of the First Defendant, I have to say that I had found little or no weight to be attached to it. Truthfully, I find it very difficult to accept the First Defendant as a witness of truth, especially in the light of other evidence as to her conduct. In particular there is the evidence that she had not informed the Plaintiff of her still subsisting marriage to John Kung Sie Kiat when they were married in Las Vegas. The Plaintiff also told the story of how he flew to London on 23 March 2000 to surprise the First Defendant because the First Defendant had called to inform that she had given birth to their son in London when in fact, she had been in Kuala Lumpur the whole time. Then there is also the unchallenged evidence that whilst continuing that 'marriage' with the Plaintiff, the First Defendant was also living with Bart in Kuala Lumpur together with William and Jordan. Last but not least, there is also the issue of the falsification of information in Jordan's birth certificate which the First Defendant had admitted doing. Taking these facts into account I am of the view that it would be very dangerous for me to accept her averments that she had not given her consent to the adoption. What reason can the Second and the Third Defendants have to say that the First Defendant had given her consent when in fact she has not. Based on these findings, I find that the First Defendant's averments that she, in fact, did not give her consent to the adoption of Jordan to the Second and Third Defendants very difficult to believe.

[18] In addition to the aforesaid learned counsel's argument respecting consent, it is contended that the appellant as the natural father was never asked for his consent. In this regard, it is uncontroverted facts that in the original birth certificate of Jordan, Bart Van Hoek had been named as the father of the child. This fact was also found in the Permohonan Pendaftaran Pengangkatan. Then, the Surat Keizinan Pengangkatan was found to state that Bart Van Hoek could not be contacted. Apparently, it was based on the aforesaid information that the fourth and fifth respondents proceeded to process and approved the application for registration of the adoption.

[19] In any event, the Registrar of Adoption in exercising his duties and powers with regard to application for registration of adoption is vested with discretion under s. 6(1)(b) in the following terms:

> Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child be may dispense with the consent of any parent or custodian of the child or with the appearance of any parent, or custodian who shall have signified his consent by statutory declaration.

[20] On the facts of this case, we are of the view that the Registrar in approving the registration of the adoption in question had exercised his discretion appropriately; after all s. 8 of the Act in no uncertain terms imposed legal duty on parties and witnesses in the application to speak the truth. In the absence of any evidence to the contrary, the registrar is expected to accept and receive evidence of any witnesses supporting such application as statement of truth and thus become duty bound to register an adoption by entering the particulars thereof in the register.

[21] Having arrived at the aforesaid finding it should logically follow that all the prayers except for prayer (a) asked for by the appellant in his application before the High Court below are unsustainable, as granting of those orders, in our view would not be in the best interest of the child concerned. In this regard we quote a passage from the decision of Lindley LJ in *In Re McGrath* [1893] 1 Ch. 143, which states:

> The duty of the Court is, in our judgment, to leave the child alone, unless he is satisfied that it is for the welfare of the child that some other course shall be taken. The dominant matter for consideration of the Court, is the welfare of the child. But the welfare of a child

> is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded ... The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child.

[22] Here, in the instant case, we have credible evidence to show that the child in question had been in the custody and care of the 2nd and 3rd respondents since the year 2000, not long after he was born. However, we also take note of the 1st respondent's claim that she had occasionally taken the child out from the 2nd and 3rd respondents custody. Nevertheless, the learned Judicial Commissioner in her judgment had made findings of facts that for all intent and purposes the child was, in fact, in the custody of the 2nd and 3rd respondents as the 1st respondent was seeing less and less of him. The Judicial Commissioner had also made a finding of facts that the 2nd and 3rd respondents were in good position to provide well for the child. At the same time, we are also conscious of the fact that the 2nd and 3rd respondents being Muslims themselves must have brought up the child in Islamic way. Thus, it is our view that the child who is now about ten years of age is comfortably lodged in the custody and care of his aunt (2nd respondent) and her husband, and it would not be in the best interest and welfare of the child to dislodge him and place him in the care and custody of the appellant who is virtually a stranger to him.

[23] For all the aforesaid reasons we dismissed the appeal with an additional order that the granting of prayer (b) by the Judicial Commissioner be set aside.